STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99, Charging Party, v. THE ACCELERATED SCHOOLS, Respondent.	Case Nos. LA-CE-6431-E LA-CE-6473-E LA-CE-6505-E LA-CE-6515-E PERB Decision No. 2855 March 17, 2023

Appearances: Rothner, Segall & Greenstone by Carlos Coye, Attorney, for Service Employees International Union, Local 99; Liebert Cassidy Whitmore by Adrianna Guzman and Anni Safarloo, Attorneys, for The Accelerated Schools.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Service Employees International Union, Local 99 (SEIU) to a proposed decision of an administrative law judge (ALJ). The proposed decision addressed four unfair practice charges SEIU filed against The Accelerated Schools (TAS), a nonprofit public benefit corporation operating charter schools within the Los Angeles Unified School District. PERB consolidated the four cases after the Office of the General Counsel (OGC) issued a complaint in each case alleging that TAS violated the Educational Employment Relations Act (EERA).[1]

[1] EERA is codified at Government Code section 3540 et seq. All undesignated statutory references are to the Government Code.

In the first two cases, the complaints alleged interference with protected activities, and the ALJ found in favor of SEIU. Specifically, the ALJ found that TAS Chief Executive Officer Johnathan Williams interfered with protected activity when he: (a) threatened SEIU organizer Jorge Roman and SEIU chief steward Hilda Rodriguez-Guzman while they distributed bargaining updates on a public sidewalk outside the main TAS campus; and (b) monitored and surveilled Roman while he attempted to meet with employees.

In the third and fourth cases, the complaints alleged that TAS violated EERA in multiple respects when it eliminated Rodriguez-Guzman's Health Services Coordinator position, laid her off, and created an unrepresented Registered Nurse (RN) position to provide higher-level health care services. The ALJ concluded that these actions were not retaliation for protected activity. The ALJ also dismissed, without any analysis, an allegation that TAS engaged in unlawful direct dealing when it presented Rodriguez-Guzman with a severance agreement. But the ALJ found TAS liable for not affording SEIU adequate notice and an opportunity to meet and negotiate before TAS laid off Rodriguez-Guzman. The ALJ directed TAS to bargain and to pay Rodriguez-Guzman monetary compensation until bargaining is complete, but the ALJ did not direct TAS to reinstate her.

TAS filed no exceptions and urges us to affirm the proposed decision. SEIU primarily excepts to: (1) the ALJ's conclusion on the retaliation claim; (2) the ALJ's failure to analyze the direct dealing claim; and (3) the ALJ's decision not to reinstate Rodriguez-Guzman.

Having reviewed the proposed decision, the parties' arguments, and the record,

we do not sustain SEIU's exceptions. For the reasons explained below, we find that TAS did not retaliate against Rodriguez-Guzman and that the proper remedy in this matter does not include reinstatement. In resolving the remedy question, we clarify and update PERB precedent on remedying effects bargaining violations. While the ALJ should have analyzed the direct dealing allegation, we exercise our discretion not to resolve or remand that claim given that our remedial order already orders TAS to bargain with SEIU over the effects of its layoff decision. (*City of Bellflower* (2021) PERB Decision No. 2770-M, p. 10 [declining to resolve or remand a claim that would not materially alter the Board's remedy even were it proven]; *County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 83 [same]; *City of Glendale* (2020) PERB Decision No. 2694-M, pp. 58-59 [same] (*Glendale*).)[2]

FACTUAL AND PROCEDURAL BACKGROUND

TAS is a public school employer within the meaning of EERA section 3540.1, subdivision (k). TAS operates three charter schools: an elementary and middle school known as The Accelerated School (TAS K-8), the Accelerated Charter Elementary School, and the Wallis Annenberg High School. SEIU, an exclusive representative within the meaning of EERA section 3540.1, subdivision (e), represents employees at all three schools who are classified as preschool teachers, instructional aides, office technical employees, and operational support employees.

[2] No interference allegations are before us. We express no opinion on these now-uncontested claims and direct TAS to cease and desist from such conduct in the future. The below Factual and Procedural Background restates the proposed decision's factual findings related to interference only to the extent that such facts are relevant to SEIU's exceptions on its retaliation claim.

I. Rodriguez-Guzman's Employment and Protected Activities

In 2007, TAS hired Rodriguez-Guzman as a Health Office Aide. In that role, Rodriguez-Guzman administered first aid to ill or injured students, helped them with prescribed medications, contacted parents about student health issues, and kept student health records. At that time, TAS had approximately 1,000 enrolled students.

In 2008, Rodriguez-Guzman helped lead SEIU's organizing drive at TAS, and thereafter she became an SEIU steward. Subsequently, Rodriguez-Guzman was an SEIU bargaining team member during three rounds of contract negotiations.

In 2012, Rodriguez-Guzman sought increased pay and responsibility. In response, TAS created the Coordinator position and promoted Rodriguez-Guzman to that position. In the Coordinator role, she was responsible for organizing and monitoring health screenings, conducting site assessments, developing individual student health care plans, coordinating annual in-service training for staff and administrators, providing care to students with chronic illnesses, researching health and medical care issues, and responding to emergency medical situations to "ensur[e] appropriate immediate medical attention and related follow-up action." According to the job description, an employee could fill the Coordinator position without holding any license other than certificates in first aid and cardio-pulmonary resuscitation.

In July 2018, Rodriguez-Guzman and Roman distributed a bargaining update, called the *Panther Report*, on a public sidewalk in front of the TAS main campus. Rodriguez-Guzman also left copies in an employee breakroom. Williams removed the flyers from the breakroom, loudly confronted Rodriguez-Guzman and Roman about their leafletting, and threatened to report them to their supervisors. That confrontation

led SEIU to file its first charge alleging interference, PERB Case No. LA-CE-6431-E.

In October 2018, Rodriguez-Guzman spoke at a candlelight vigil in support of SEIU's bargaining demands. TAS management in attendance included Williams, TAS Human Resources Manager Asha Marshall, and TAS K-8 Principal Francis Reading. Before the vigil began, Williams approached Rodriguez-Guzman and other employees, yelled at them, and threatened to call the police. Williams also openly photographed Rodriguez-Guzman and other participants with his cell phone.

In November 2018, Williams monitored and surveilled Roman while he was on campus, thereby impeding Roman and TAS employees from speaking with one another and discouraging them from engaging in protected activities. This conduct led SEIU to file its second charge alleging interference, PERB Case No. LA-CE-6473-E.

During a December 2018 public meeting of the TAS Board, Rodriguez-Guzman complained about Williams' conduct.

In January 2019, Rodriguez-Guzman supported a strike by a bargaining unit of TAS teachers represented by a different union.[3] Rodriguez-Guzman joined the picket line and attended press conferences, among other activities supporting the strike. She also appeared in multiple Los Angeles Times photos about the strike.

In February, TAS removed Williams as CEO. In March, Williams began serving as TAS's Head of Governmental Affairs and Fundraising.

II. Management's Actions Adverse to Rodriguez-Guzman

On April 15, TAS placed Rodriguez-Guzman on paid administrative leave,

[3] All further dates refer to 2019 unless otherwise noted.

telling her that it could no longer reasonably accommodate requested work restrictions.[4] Meanwhile, TAS conducted its annual survey in March and April, as part of seeking stakeholder input to update its local control and accountability plan (LCAP). When TAS distributed the survey at a TAS K-8 parent meeting, 84 parents returned completed surveys. LCAP Data Coordinator Simone Barclay reviewed these 84 responses and created a summary. The summary showed that 16 responses mentioned hiring a nurse, 11 mentioned hiring a psychologist, and 17 mentioned hiring more fully credentialed teachers. On April 22, Barclay provided the summary to Principal Reading and Assistant Principal Ashley Zartner.[5]

TAS Chief Financial Officer Vincent Shih created a working group to consider whether TAS should hire an RN. The members of the working group were Reading, Special Education Administrator Randhir Bains, and Office Manager Janet Mixquitl.

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[4] There is no claim before us that TAS made this decision in retaliation for activity that EERA protects. However, SEIU supports its retaliatory layoff claim by alleging that Marshall, at reasonable accommodation meetings on March 26 and May 1, suggested that TAS managers harbored discriminatory animus against Rodriguez-Guzman. We consider that evidence *post* at page 12.

[5] Barclay authenticated and laid a foundation for the summary. It is not hearsay because it falls within the official records exception. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 9 (*Bellflower USD I*).) SEIU nonetheless argues that the summary is inadmissible because TAS did not introduce the underlying survey responses. The Evidence Code grants discretion to admit secondary evidence to prove the content of a writing if the evidence is otherwise admissible, though the trier of fact should reject such evidence where there is a genuine and material dispute about the content of the writing (Evid. Code, § 1523, subd. (a)) or admission would be unfair (*id*., subd. (b)). The Evidence Code adds further restrictions on oral secondary evidence (Evid. Code, § 1523), but in this case the secondary evidence was a written summary. SEIU has not persuaded us to reject the summary under Evidence Code section 1521, subdivision (a) and/or (b).

The working group concluded that a full-time RN could improve services and implement a broad program of health education and services.

TAS management came to believe that an RN could offer services and education that a non-RN could not, and that even as to those services the Coordinator had performed in the past, an RN would provide fundamentally upgraded services. Among the new and higher level services TAS believed an RN could provide were: meeting the needs of students with disabilities; serving as an information conduit to and from the medical community; providing vision and hearing screenings; providing immediate critical care to students experiencing acute illness or injury; training other staff on medical-related issues; and handling an array of devices such as epinephrine injection pens and catheters.

In June, Robert French replaced Marshall as the TAS Director of Human Resources. Shih told French that TAS had decided to hire a nurse and eliminate the Coordinator position. French thereafter created an RN job description, posted the opening, and began the selection process. French, Shih, Reading, and Bains took part in this process.

In July, French e-mailed Rodriguez-Guzman that TAS was eliminating the Coordinator position, replacing it with an RN position, and laying her off. French attached to the e-mail a one-page notice of layoff and a severance agreement.

Williams did not take part in the decision to establish an RN position and lay off Rodriguez-Guzman.

In September and October, SEIU filed its two charges about management's actions in creating the RN position, eliminating the Coordinator position, and laying off

Rodriguez-Guzman. One charge, Case No. LA-CE-6505-E, alleged failure to meet and negotiate in good faith. The other charge, Case No. LA-CE-6515-E, alleged retaliation for protected activity.

After OGC issued complaints with respect to all four of SEIU's charges, the ALJ consolidated them and held a formal evidentiary hearing over eight nonconsecutive days between July 2021 and January 2022. The parties then filed post-hearing briefs and the ALJ issued his proposed decision in August 2022.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, if a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not affect the outcome. (*Ibid*.) To the extent an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.)

Before turning to the substantive issues, we address a procedural issue. Revisions to PERB Regulations that took effect in January 2022 direct an excepting party to file a single, integrated document—which may be in the form of a brief—while also authorizing a later reply brief focused on responding to new issues that the responding party raised in its opposition. (PERB Regs. 32300, subds. (b) and (d), 32312, subd. (c).)[6] SEIU instead followed a practice permitted under the former

[6] PERB Regulations are codified at California Code of Regulations, title 8,

version of PERB Regulations, concurrently filing one document entitled "Exceptions to Proposed Decision" and another entitled "Brief in Support of Exceptions to Proposed Decision." We have discretion whether to accept or reject either or both documents. (*Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 14 (*Bellflower USD II*) [although the respondent's exceptions failed to cite to legal authority as required by PERB Regulations, Board nonetheless "thoroughly analyzed the record and applicable law" to ensure that its order was correct]; *Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 8 [Board exercised its "discretion to address [charging party's] exceptions despite their technical non-compliance with Regulation 32300"].) Either of SEIU's two filings alone is sufficiently clear to allow us to research and resolve this matter, and we have exercised our discretion by considering only the document filed in the form of a brief.

I. Retaliation

To establish a prima facie case of retaliation, a charging party has the burden to prove, by a preponderance of the evidence, that: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more of the employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.) If the

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section 31001 et seq.

charging party meets its burden to prove each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the exact same action even absent protected activity. (*Ibid*.) This affirmative defense is most typically available when, even though the charging party has proven that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. (*Id*. at pp. 15-16.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Id*. at p. 16.)

In this case, no dispute remains as to the first three elements of SEIU's prima facie case, as no party filed exceptions to the ALJ's findings that Rodriguez-Guzman engaged in protected activity, individuals responsible for Rodriguez-Guzman's layoff knew about most of this protected activity, and TAS took adverse action against Rodriguez-Guzman. Nor does either party explicitly challenge the fourth element, commonly referred to as the "nexus" factor. The primary liability issue before us relates to TAS's affirmative defense, though that issue naturally overlaps with the nexus question. (*State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, p. 21.)

The ALJ, in concluding that TAS proved it had a non-discriminatory reason for laying off Rodriguez-Guzman, explained as follows:

> "The evidence presented at hearing established that after evaluating the TAS parent requests, a group of TAS administrators collaborated and determined the TAS healthcare services needs required a higher level of knowledge, skill, and licensure, in large part due to the increase in the TAS student population. As a result, TAS

> administration made the decision to create and hire a registered nurse after determining that Rodriguez-Guzman's Healthcare Service Coordinator [position] would be redundant and financially unsound, and, therefore, TAS made the decision to eliminate the position and lay off Rodriguez-Guzman."

In reviewing this conclusion, we consider all facts and circumstances relevant to motivation. The following factors are the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures or standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (*City and County of San Francisco*, *supra*, PERB Decision No. 2712-M, p. 21.)

Timing of protected activity in relation to an adverse action is not typically sufficient, by itself, to prove discrimination. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 45-46.) That is certainly the case here. While it is possible for an employee to receive a promotion after certain protected activity but then eventually run into discrimination while engaging in further protected activity, we must weigh the evidence concerning any such claim. (*Id*. at pp. 46-47 [if an employee engages in protected activity for an extended period and the employer only takes adverse action toward the end of this period, PERB assesses whether animus built over time, or the employer lacked earlier opportunities to take such action].)

Here, this assessment turns, in part, on a significant credibility dispute over alleged statements during March 26 and May 1 accommodation meetings Rodriguez-Guzman had with Marshall, who was then serving as TAS Human Resources Manager. According to Rodriguez-Guzman, on March 26 Marshall gave her a "heads-up" that TAS "administration, meaning principals, executives and the Board" were discussing ways to "get rid of [her]," including using the parent survey results. Rodriguez-Guzman asserts that on May 1, Marshall again told her that "they" are going to use the parent survey results to "get rid of" her. Rodriguez-Guzman also testified that she told Roman about Marshall's March 26 statement that same day. Roman supported Rodriguez-Guzman in general terms, though Roman's testimony lacked detail; he recalled hearing that "in the course of labor-management meetings," Marshall told Rodriguez-Guzman "to better watch out because they were coming to get her." Marshall flatly denied making any of these alleged statements. She further testified that she was unaware of any TAS plans to separate Rodriguez-Guzman from employment.

The ALJ credited Marshall over Rodriguez-Guzman and Roman on these factual disputes. The ALJ found that Marshall's testimony was clear and precise, and that as a former employee, she had the opportunity to testify without fear of repercussion from her employer. Having reviewed the record, we do not disturb the ALJ's credibility determination.

In discrediting Rodriguez-Guzman's critical testimony, the ALJ minimized the main basis by which SEIU could prevail, particularly given that Williams was not involved in the layoff or associated decisions. There is no other evidence suggesting

that Shih appointed the working group for discriminatory reasons, and the record shows the group spent several months legitimately exploring whether to establish an RN position. Most importantly, TAS based its eventual decision on legitimate, nondiscriminatory reasons. Specifically, TAS concluded that student healthcare services would significantly improve if an RN replaced the unlicensed Coordinator.[7]

While an employer is liable for discrimination if it exercises a legitimate management right for a discriminatory reason (*County of Lassen* (2018) PERB Decision No. 2612-M, p. 6; *Berkeley Unified School District* (2003) PERB Decision No. 1538, pp. 4-5), in this case a preponderance of the evidence shows that TAS would have reached the same decisions even had Rodriguez-Guzman not engaged in protected activity. Like the ALJ, we therefore dismiss SEIU's retaliation claim.

II. Bargaining Violation

An employer's failure to provide an exclusive representative with adequate notice and an opportunity to bargain is a per se violation of the duty to bargain in good faith if the decision itself falls within the scope of representation, or if the decision has reasonably foreseeable effects on terms or conditions of employment. (*Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 18; *Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 20.) In the former instance we refer to the employer as having a "decision bargaining obligation," while in

[7] In its exceptions, SEIU notes that when Barclay summarized 84 parent survey responses, this represented results from only one of the three TAS schools. While survey responses from one school do not by themselves prove that TAS acted in a non-discriminatory manner, these responses tend to show that TAS took parental input into account in its decision.

the latter case the employer has an "effects bargaining obligation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 8, 23-24 (*Santa Clara I*); *County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 12 (*Santa Clara II*).)[8]

While TAS now admits it engaged in a bargaining violation, to consider the appropriate remedy we need to categorize it as either a decision bargaining violation or an effects bargaining violation. *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*) outlines the general test for assessing whether a topic falls within EERA's scope of representation.[9] However, for certain recurring topics, PERB follows subject-specific standards that implement the overall scope of representation test. (*City and County of San Francisco* (2022) PERB Decision

[8] Although an employer engaged in effects negotiations need not bargain over the policy reasons for its decision, it cannot refuse to bargain over alternatives, as those alternatives fundamentally impact the employment effects at issue. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 51 (*Oxnard*); *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 27 (*Santa Clara III*); *Anaheim Union High School District* (2016) PERB Decision No. 2504, pp. 10-11, 15 & adopting proposed decision at p. 41; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22 (*Sacramento*).) Indeed, one purpose of effects bargaining is to permit the exclusive representative an opportunity to persuade the employer to consider alternatives that may diminish the impact of the decision on employees. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 52; *Santa Clara III*, *supra*, PERB Decision No. 2799, p. 27.)

[9] Under *Anaheim*, *supra*, PERB Decision No. 177, a topic falls within the scope of representation if it is a statutorily-enumerated subject of bargaining or, if: (1) it is logically and reasonably related to wages, hours or other statutorily enumerated subjects of bargaining; (2) it is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective bargaining is an appropriate means for resolving such conflict; and (3) its designation as a negotiable subject would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) that are essential to achieving its mission. (*Id*. at pp. 4-5.)

No. 2846-M, p. 18, fn. 15.) These standards promote consistency and predictability by obviating the need to "reinvent the wheel" and assess what types of facts are important each time a subcontracting or transfer of work case arises. (*Id*. at pp. 18-19, fn. 15.) Absent such consistent standards, an employer would not know in advance whether the law requires it to bargain a decision. (*Ibid*.)

In layoff cases, the overarching rule is that an employer has a decision bargaining obligation when a layoff is inextricably linked to a bargainable subcontracting or transfer of work decision, and otherwise the employer has an effects bargaining obligation. (*International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 273-274 & 277 (*Richmond Fire Fighters*); *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621-622 (*Vallejo*); *Glendale*, *supra*, PERB Decision No. 2694-M, p. 17, fn. 9; see also *id*. at p. 48.) In this case, there is no subcontracting alleged, but SEIU claims TAS transferred work out of the bargaining unit when it abolished the Coordinator classification and created a new RN classification. Under *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, an employer must engage in decision bargaining if creation or abolition of classifications involves transfer of traditional bargaining unit duties without fundamental changes. (*Id*. at pp. 10-12.)

SEIU has a colorable argument that TAS transferred out of the unit certain Coordinator duties, thereby requiring decision bargaining. However, weighing the evidence and drawing reasonable inferences, we find that in creating the RN job description, TAS supplemented and upgraded the former Coordinator duties to such a degree that even the allegedly transferred duties became significantly higher in level

than they had been as Coordinator duties. (See *Santa Clara II*, *supra*, PERB Decision No. 2680-M, p. 11 [employer had no decision bargaining obligation when it upgraded its level of protecting the public by replacing a bargaining unit security guard with a non-unit deputy sheriff].) Given there is no dispute that only an RN could provide the desired level of service, nor any dispute that RNs fall outside the bargaining unit, TAS had an effects bargaining obligation rather than a decision bargaining obligation.

TAS no longer disputes that it violated its duty to bargain effects.[10] However, the parties dispute the proper remedy for the bargaining violation.

III. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of EERA and the other acts we enforce. (EERA, §§ 3541.3, subd. (i); 3541.5, 1st par. & subd. (c); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harms an unfair practice causes and deterring further violations. (*County of San*

[10] For instance, TAS does not claim it was privileged to implement its changes before completing effects negotiations based on *Compton Community College District* (1989) PERB Decision No. 720, pp. 14-15 (*Compton*) [employer has the right to implement changes before completing effects negotiations if: (1) implementation date is based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) employer gives sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) employer negotiates in good faith prior to and after implementation].) Nothing in this decision precludes an employer from asserting a *Compton* defense, including in circumstances where the Education Code sets a deadline by which layoffs must occur.

Joaquin v. Public Employment Relations Bd. (2022) 82 Cal.App.5th 1053, 1068 (*San Joaquin*); *Bellflower USD II*, PERB Decision No. 2544a, p. 26.) While remedial orders must rely to a degree on estimates, that is preferable to allowing uncertainty caused by unlawful conduct to leave an unfair practice without any effective remedy. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 20 (*Bellflower USD III*); *Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21, fn. 13 (*Lodi*); *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14, & 26-27.)

In remedying effects bargaining violations, PERB recognizes that they are equally harmful as decision bargaining violations, as both disrupt and destabilize employer-employee relations by creating an imbalance in the power between management and employee organizations. (*Santa Clara I*, *supra*, PERB Decision No. 2321-M, pp. 23-24.) In other words, the effects bargaining obligation is not an inferior duty. (*Id*. at p. 24; *Santa Clara II*, *supra*, PERB Decision No. 2680-M, p. 13.)

TAS concedes that, because it failed to provide SEIU with notice and an opportunity to bargain effects, it owes Rodriguez-Guzman "backpay from the date of her separation in 2019 until TAS has satisfied its obligations under EERA regarding bargaining the effects of the layoff and the decision to eliminate the Health Services Coordinator position." The parties dispute only whether the ALJ erred in not reinstating Rodriguez-Guzman. Notably, however, resolving this dispute goes to the heart of how PERB remedies effects bargaining violations, requiring us to integrate and update disparate precedent covering reinstatement and back pay.[11]

[11] We use "back pay" as a shorthand for all the forms of make-whole relief discussed in *Bellflower USD II*, *supra*, PERB Decision No. 2544a.

A. Reinstatement

In arguing for reinstatement, SEIU relies in significant part on precedent where the employer had a decision bargaining obligation because layoffs were inextricably intertwined with a decision to assign non-unit employees or subcontractors work that was substantially similar to work that bargaining unit employees traditionally performed. (See, e.g., *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, pp. 35 & 94-96 [reinstating laid off youth music instructors where program continued via grant to a non-University entity that amounted to subcontracting, and holding that even a decision affecting "the merits, necessity or organization" of a service is subject to decision bargaining if it is "intertwined with a negotiable decision"]; *Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 19-20 & 49 [ordering reinstatement where all that changed as a result of city's decision to transfer work was the identity of the employees assigned to perform the duties, in contrast to cases in which an employer lays off employees because it is changing its level of services].) These decisions require no clarification. There is no question that where an employer does not fulfill its decision bargaining obligation, PERB's standard remedy includes rescission and make whole relief. (*Lodi*, *supra*, PERB Decision No. 2723, p. 20; see also *County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, pp. 16-19 & 26-27.)

Where PERB orders reinstatement, back pay ends on the reinstatement date. The employer may then provide the union with notice and an opportunity to bargain over a new, prospective decision, meaning it may eventually effect its desired change by reaching an agreement or by imposing its last, best, and final offer after bargaining

to a good faith impasse and participating in good faith in all required and agreed upon impasse procedures. Because reinstated employees are back at work throughout such negotiations, neither party must bargain from a position of unlawful advantage or disadvantage. (*Bellflower USD II*, *supra*, PERB Decision No. 2544a, pp. 21, 23-24 [reinstatement is a critical part of restoring the status quo, which is necessary before parties can engage in fair negotiations]; *County of Merced* (2020) PERB Decision No. 2740-M, pp. 21-23 [if employer fails to rescind its unlawful decision and restore the status quo, good faith decision bargaining is impossible].)

If an employer has no decision bargaining obligation but violates its duty to bargain effects, PERB does not necessarily direct the employer to rescind its underlying decision.[12] (*Santa Clara III*, *supra*, PERB Decision No. 2799-M, pp. 28-29.) As explained below, however, if PERB does not order reinstatement or other forms of rescission for an effects bargaining violation, full retroactive back pay may be necessary to provide adequate compensation, deterrence, and a level field for fair effects negotiations.

B. Back Pay

To remedy an effects bargaining obligation, PERB generally directs the offending employer to provide back pay from the first date that employees began to experience harm until the earliest of: (1) the date the parties reach an agreement, typically as part of complying with PERB's effects bargaining order; (2) the date the parties reach a good faith final impasse, including exhaustion of any required or

[12] However, nothing prevents the employer from cutting off its back pay liability by voluntarily offering reinstatement before or during effects negotiations.

agreed upon post-impasse procedures; or (3) the date the union fails to pursue effects negotiations in good faith. (*Santa Clara III*, *supra*, PERB Decision No. 2799-M, p. 28; *County of Ventura* (2021) PERB Decision No. 2758-M, pp. 53 & 56; *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 58; *Santa Clara II*, *supra*, PERB Decision No. 2680-M, p. 14.)

However, this rule requires clarification to explain the extent to which California public sector labor law jurisprudence should incorporate the shorter back pay remedy that the federal National Labor Relations Board (NLRB) devised in *Transmarine Navigation Corp*. (1968) 170 NLRB 389 (*Transmarine*). There, the employer closed a facility while refusing to bargain over foreseeable effects on terms and conditions of employment. (*Id*. at p. 389.) Because the employer could close its plant for economic reasons without bargaining over the decision, the NLRB declined to order back pay retroactive to the layoff date, instead ordering that back pay should begin when the parties start effects negotiations and continue for the length of those negotiations or for two weeks, whichever is greater. (*Id*. at p. 390.) *Transmarine*, which certain older PERB decisions have cited with approval, is therefore incongruous with PERB's modern back pay standard for effects bargaining violations.

In the below discussion, we harmonize our precedent, explaining that a *Transmarine* remedy effectuates the purposes of California public sector labor law only in limited circumstances: if the effects negotiations arose because of an employer's decision to close a facility or cease offering a service. To show why this is the case, we analyze precedent and discuss substantial reasons why *Transmarine*

should not extend beyond facility closures and similar decisions. We also overrule, in part, eight older PERB decisions in which the Board extended *Transmarine* beyond its proper scope.

In *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848 (*Highland Ranch*), the California Supreme Court noted that the Agricultural Labor Relations Board (ALRB) must follow applicable NLRB precedent (*id*. at p. 856), and the Court affirmed the ALRB's *Transmarine* remedy for an employer's failure to bargain the effects of its decision to sell its business (*id*. at pp. 862-864). The Court highlighted the *Transmarine* remedy's provenance in federal "cases in which an employer failed to bargain with a union over the effects of its decision to go out of business." (*Id*. at p. 864; see also, e.g., *Vallejo*, *supra*, 12 Cal.3d at p. 616, fn. 8 [under *Transmarine*, an employer has the right to "terminate its business and reinvest its capital in a different enterprise"].) Although *Highland Ranch* is not controlling precedent here, we find it persuasive in the limited context of employer decisions to sell or close a facility or equivalent decisions to cease offering a service.[13]

[13] *Highland Ranch* was correct in noting that the ALRB must follow applicable NLRB precedent. (See Lab. Code, § 1148.) In contrast, California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, and PERB considers federal precedent only for its potential persuasive value. (*Operating Engineers Local Union No. 3 (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10; *City of Santa Monica*, *supra*, PERB Decision No. 2635a-M, p. 47, fn. 16; *City of Commerce* (2018) PERB Decision No, 2602-M, pp. 9-11; see also *San Joaquin*, *supra*, 82 Cal.App.5th at p. 1073 [federal authority is merely persuasive]; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391 [when interpreting California public sector labor relations laws, federal precedent is a "useful starting point," but it does "not necessarily establish the limits of California public employees' representational rights"]; *County of San Joaquin*, *supra*, PERB

Later precedent interpreting *Highland Ranch* further persuades us to this view. First, in *El Dorado County Deputy Sheriff's Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950 (*El Dorado*), the court explained that in *Highland Ranch*:

> "[T]he Supreme Court held that the proper remedy for an employer's failure to negotiate with a labor union before shutting down its business (by selling the ranch) was to not only bargain over the effects of the shutdown but also to pay the employees during that bargaining period in order to restore some of the bargaining power lost when the employer unilaterally shut down. This creative remedy was necessary because the employer's action could not be undone, not because the employer had exercised some inalienable management right."

(*Id*. at p. 964 [citations omitted].) *El Dorado*, therefore, supports limiting *Highland Ranch* to a narrow range of cases.

The same is true of *Boling v. Public Employment Relations Bd.* (2019) 33 Cal.App.5th 376 (*Boling*), where a city did not fulfill its bargaining obligation before the mayor worked with others to place a pension initiative on the ballot. (*Id*. at p. 381.) The court, noting that the initiative "could not be undone" by PERB because only a later quo warranto proceeding could invalidate the initiative, looked to effects bargaining cases to consider the proper remedy. (*Id*. at pp. 388-389.) Nonetheless, the court notably did not order a *Transmarine*-type remedy. Rather, the court ordered full make-whole relief from the first date of injury until the city fulfilled its bargaining

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Decision No. 2761-M, pp. 24, 33, 45-48 & fn. 19 [considering private sector labor law precedent for its persuasive value while noting certain differences in California public sector labor law precedent]; *City of Bellflower* (2020) PERB Order No. Ad-480-M, p. 11 [both "statutory differences and distinct principles relevant to agencies serving the public have frequently led the Board to craft sui generis precedent"].)

obligation, exactly as we do here. (*Id*. at p. 389 [measuring damages by the difference "between the compensation, including retirement benefits, the employees would have received before the Initiative became effective and the compensation the employees received after the Initiative became effective"].) As the court explained, this remedy is "compensatory in that it reimburses employees for the losses they incur as a result of delays in the collective bargaining process," and it "reduces the employer's financial incentive for refusing to bargain." (*Ibid*., internal quotation marks omitted.)

Beyond the above precedent, there are even more important reasons why it is unsuitable to expand *Transmarine* by applying "*Transmarine*-type" remedies in a broad range of cases, and why we therefore endorse the middle ground approach that TAS proposes—full back pay from the date of layoff through the end of effects bargaining, but no reinstatement. We explain the most significant of these reasons.

First, *Transmarine* arose in a private sector framework in which an employer must engage in effects bargaining when closing part of its business or changing its nature or scope, but otherwise generally must engage in decision bargaining over layoffs. (*Pan American Grain Co., Inc. v. NLRB* (1st Cir. 2009) 558 F.3d 22, 27-28 (*Pan American Grain*); *Holmes & Narver* (1992) 309 NLRB 146, 147 [decision bargaining required before employer decides "to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments"].) When a private sector employer violates that decision bargaining duty, the NLRB grants reinstatement and full back pay rather than a *Transmarine* remedy. (*Pan American Grain*, *supra*, 558 F.3d at pp. 28-29 & fn. 8 [rejecting employer's argument that the court should extend

Transmarine to remedy the employer's failure to bargain regarding layoffs]; *NLRB v. Sandpiper Convalescent Center* (4th Cir. 1987) 824 F.2d 318, 321-322 & 324 [reinstatement and full back pay appropriate for failure to bargain over layoffs, since employer decision did not involve closing down any part of its business or an equivalent change in its nature or scope]; *Lapeer Foundry & Mach.* (1988) 289 NLRB 952, 955 [to remedy employer's failure to bargain over layoffs, "backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions"].)

In eight PERB decisions issued between 1982 and 1997, the Board transplanted the private sector's *Transmarine* remedy into circumstances that did not involve closing a facility or any like decision, without acknowledging the significant expansion.[14] The primary means of this expansion was the fact that in the California public sector, bargaining related to layoffs occurs as part of effects negotiations, unless the layoffs are inextricably intertwined with subcontracting or transfer of work. (See discussion *ante* at pp. 15 & 18.) This difference between the private sector and public sector is real but not titanic, because a public sector union engaged in effects

[14] The eight decisions are: *South Bay Union School District Board of Trustees* (1982) PERB Decision No. 207a, pp. 3-4 (*South Bay*); *Solano County Community College District* (1982) PERB Decision No. 219, pp. 17-18 (*Solano*); *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 46-47 (*Oakland*); *County of Kern* (1983) PERB Decision No. 337, p. 14 (*Kern*); *Mt. Diablo Unified School District* (1983) PERB Decision No. 373, pp. 67-71 (*Mt. Diablo I*); *Mt. Diablo Unified School District* (1984) PERB Decision No. 373b, pp. 25-26 (*Mt. Diablo II*); *Placentia Unified School District* (1986) PERB Decision No. 595, p. 11 & adopting proposed decision at pp. 26-28 (*Placentia*); and *Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H, p. 4 & adopting proposed decision at pp. 32-33 (*Livermore*).

negotiations related to layoffs has the right to bargain over most topics that a private sector union may negotiate in decision bargaining. (*Richmond Fire Fighters*, *supra*, 51 Cal.4th at pp. 276-277; see also *id*. at pp. 272-273 [relying heavily on private sector labor law principles].)

Richmond Fire Fighters left no doubt that public sector employers must honor the duty to engage in effects bargaining in layoff cases, while leaving open what remedy is proper when an employer violates this duty. It is PERB's role to exercise its discretion to adopt remedies reflecting the nuanced differences between public sector and private sector labor law. (*San Joaquin*, *supra*, 82 Cal.App.5th at pp. 1073 & 1086-1087.) Given the unique nature of public sector labor law, we hold that an effects bargaining remedy does not necessarily include reinstatement, even in a layoff case for which the NLRB would grant reinstatement. But it is injudicious to adopt a *Transmarine* remedy (and thereby order *neither* reinstatement *nor* retroactive back pay) in a broad range of cases for which the remedy was not designed, as doing so eviscerates the purposes of California labor law.

To understand why a different rule is proper for effects bargaining violations involving a facility closure or decision to cease offering a public service, it is important to consider, first, that a union cannot meaningfully bargain over most effects (including the timing, number, and identity of employees subject to layoff) unless negotiations occur before the employer implements its layoffs. (*First Nat. Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 681-682 ["[B]argaining over the effects of a decision must be conducted in a meaningful manner at a meaningful time"]; *Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 29 & 40 [same].) Thus, when we issue merely

a *Transmarine*-type remedy years after a layoff, we are unable to provide the union with a real bargaining opportunity, and we effectively assume the parties would not have reached a compromise changing the number or identity of bargaining unit employees subject to layoff. We are willing to risk that problematic assumption where the employer has closed a facility or ceased offering a service, since contemporaneous negotiations in those instances have the least likelihood of altering a planned layoff. We therefore continue to endorse a *Transmarine* remedy in such circumstances. (See, e.g., *Bellflower USD I*, *supra*, PERB Decision No. 2385, pp. 1 & 12-14 [school district decided to close a school and lay off employees as a result].) Timely negotiations are important in those circumstances, too, meaning that a *Transmarine* remedy is far from perfect even in cases involving a facility closure, especially because it inadequately deters further violations. Nonetheless, to lessen the likelihood that we order an employer to do more than it would have done had it bargained in good faith, we leave *Transmarine* undisturbed in such cases.

In contrast, when an employer's effects bargaining obligation does not arise from a decision to close a facility or cease offering a service, contemporaneous good faith negotiations have a higher likelihood of effecting change in the employer's plan, particularly because a union can offer meaningful concessions and compromises that it cannot offer years after the fact in the wake of a PERB remedial order. Indeed, if an employer has decided to institute a layoff but is neither closing a facility nor ceasing a service, timely negotiations allow economic concessions to be offered in exchange for reduced layoffs, as well as an opportunity to convince the employer to lay off more unrepresented supervisors and fewer unit employees. It is therefore more uncertain in

such cases whether contemporaneous bargaining would have led to more or different employees being retained.

As noted at page 17 *ante*, uncertainty as to what would have occurred contemporaneously, when caused by a wrongdoer's unlawful conduct, warrants placing the risk on the wrongdoer rather than the innocent. (*Bellflower USD III*, *supra*, PERB Decision No. 2796, p. 20.) Therefore, when an employer has neither closed a facility nor ceased offering a service, a *Transmarine*-type remedy does not adequately deter violations, improperly saddles innocent employees with the downside risk of uncertainty, and insufficiently compensates them for having lost the opportunity to bargain at a meaningful time.

Here, for instance, a *Transmarine*-type remedy would assume that negotiations could not possibly have resulted in a middle ground such as: TAS hiring only a part-time RN; or finding room to keep the Coordinator at a part-time or full-time level while perhaps adding other non-health care duties to the Coordinator position; or retaining Rodriguez-Guzman while she worked toward an RN license. We cannot assume the outcome of such negotiations, and a *Transmarine*-type remedy would improperly do so by offering only a short amount of back pay years later, long after the layoff and associated changes are complete.

Sacramento, *supra*, PERB Decision No. 2351-M is in accord, noting how critical it is to allow meaningful, contemporaneous discussion of alternatives irrespective of whether the employer must bargain over the decision or the effects:

> "Although alternatives to layoffs are analyzed as 'effects' of the decision to layoff, PERB has similarly recognized that alternatives to layoffs, such as concessions in wages or benefits, are also appropriate matters for collective

> bargaining. Whether in situations where the underlying decision is itself negotiable, such as a transfer of work from one unit to another, or in situations where only the 'effects' of a layoff decision are negotiable, the rationale is essentially the same: because of the exclusive representative's unique ability to offer concessions in employee wages or benefits, such matters are at least as amenable to collective bargaining, and quite likely more amenable, than a 'lack of work' situation involving an elimination, reduction or change in the kind of services offered."

(*Id*. at p. 22, citation omitted.)

Moreover, outside of circumstances where an employer closes a facility or ceases to offer a service, it is often a close call whether decision bargaining or effects bargaining is required. As noted at pages 15-16 *ante*, the decision to transfer Coordinator duties to an RN while also upgrading those duties could plausibly be framed as triggering either decision bargaining or effects bargaining. The closeness of this determination further supports the notion that while an effects remedy need not include reinstatement, it should at least include retroactive back pay in those circumstances where the employer has violated its bargaining duty but has neither closed a facility nor ceased offering a service.

Today's holding is also necessary to vindicate the principle that effects bargaining violations and decision bargaining violations are equally harmful. While there may be less need for deterrence when an employer has decided to close a facility or cease offering a service, if employers can commit effects bargaining violations with relative impunity in garden variety cases such as this one, then the consequence is to make the effects bargaining duty an inferior one.

Notably, the Board has acknowledged the weakness inherent in a

Transmarine-type remedy. (See, e.g., *Kern*, *supra*, PERB Decision No. 337, adopting proposed decision at p. 16 ["The question of whether a remedy in a case involving failure to negotiate the effects of layoff should include a restoration to employment order with a retroactive back pay award is a difficult one" because "bargaining over the effects of a decision must be conducted in a meaningful manner at a meaningful time"].) One reason prior Board precedent refrained from addressing this weakness is because those decisions did not consider any middle ground between two dichotomous options: (1) back pay retroactive to the date of harm, plus reinstatement, for all effects bargaining violations no matter the type of decision at issue; or (2) the *Transmarine* formulation—no reinstatement and back pay commencing only after the parties begin effects negotiations—for all effects bargaining violations no matter the type of decision at issue.

This view ignored two middle ground possibilities. First, it ignored that PERB need not remedy all effects bargaining violations in the same manner. Second, it ignored that reinstatement and retroactive back pay need not go hand in hand. (*Bellflower USD II*, *supra*, PERB Decision No. 2544a, p. 33, fn. 16 [reinstatement and back pay are separate remedies]; *County of Riverside* (2013) PERB Decision No. 2336-M, p. 16 [same].) In this case, we have considered the full range of possibilities and adopted two compromises. One compromise is that we endorse *Transmarine*-type remedies when the employer's violation arose from closing a facility or ceasing a service, but not otherwise. Next, we order full back pay, typically *without* reinstatement in those instances where *Transmarine* does not effectuate the law's purposes. Such full back pay is the minimum necessary to deter violations and

compensate for the loss of a chance to bargain at a meaningful time, which is exceedingly difficult to restore later. Withholding reinstatement, however, eases the employer's ability to promptly rectify its failure to bargain effects without having to fully restore the status quo.

We therefore overrule those portions of the Board's older decisions that improvidently extended *Transmarine* by adopting *Transmarine*-type remedies even though the employer neither closed a facility nor ceased offering a service. We have identified eight decisions falling within this category. It is possible that isolated other decisions exist in the same category—for instance, decisions that did not explicitly cite *Transmarine*. At present, however, the only decisions overruled, in part, are the following: *South Bay*, *supra*, PERB Decision No. 207a, pp. 3-4; *Solano*, *supra*, PERB Decision No. 219, pp. 17-18;[15] *Oakland*, *supra*, PERB Decision No. 326, pp. 46-47;[16] *Kern*, *supra*, PERB Decision No. 337, p. 14; *Mt. Diablo I*, *supra*, PERB Decision No. 373, pp. 67-71; *Mt. Diablo II*, *supra*, PERB Decision No. 373b, pp. 25-26; *Placentia*, *supra*, PERB Decision No. 595, p. 11 & adopting proposed decision at pp. 26-28; and *Livermore*, *supra,* PERB Decision No. 1221-H, p. 4 & adopting

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[15] In *Solano*, *supra*, PERB Decision No. 219, the employer initially intended to cease offering certain services, which would have made a *Transmarine* remedy proper, but it ended up continuing the services in question.

[16] While we overrule *Oakland*'s decision to adopt a *Transmarine*-type remedy, we note and agree with *Oakland*'s acknowledgement that "nothing in the language of EERA" prevents the Board from ordering both reinstatement and retroactive back pay for an effects bargaining violation. (*Oakland*, *supra*, PERB Decision No. 326, p. 45 [reinstatement and retroactive back pay "may be the appropriate remedy for the employer's failure to negotiate the decision itself or the failure to negotiate the effects of that decision provided that so ordering will effectuate the purposes of EERA"].)

proposed decision at pp. 32-33.[17]

In sum, for most effects bargaining violations, back pay runs from the date any impacted employee began to experience harm until earliest of: (1) the date the parties reach an agreement, typically as part of complying with PERB's effects bargaining order; (2) the date the parties reach a good faith final impasse, including exhaustion of any required or agreed upon post-impasse procedures; or (3) the date the union fails to pursue effects negotiations in good faith. In contrast, a *Transmarine* remedy is proper where an employer has violated its duty to bargain over the effects of closing a facility or ceasing a service.[18]

For the above reasons, TAS need not reinstate Rodriguez-Guzman, but it owes her back compensation from the date of her separation in 2019 until TAS has satisfied its effects bargaining obligations.

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[17] While *Livermore* found that the employer had only an effects bargaining obligation, the facts could have equally been framed as triggering a decision bargaining obligation because the employer transferred duties partially within the unit (see *Desert Sands Unified School District* (2001) PERB Decision No. 1468, pp. 3-4) and partially out of the unit. (*Livermore*, *supra*, PERB Decision No. 1221-H, adopting proposed decision at p. 14.)

[18] Although TAS asserted contractual waiver below, the ALJ rejected that defense and TAS filed no exceptions. We express no opinion as to the merits of such a defense based on the parties' contract. Nor do we express any opinion whether a *Transmarine*-type remedy may be proper if an employer proves that a partial contractual waiver limited the extent of its effects bargaining violation. We therefore do not consider, for instance, whether *Long Beach Community College District* (2008) PERB Decision No. 1941 was correct in determining that: (1) a union contractually waived its right to bargain over layoff decisions, effects of layoffs, and subcontracting decisions, but not over effects of subcontracting (*id*. at pp. 18-19); and (2) a *Transmarine*-type remedy was proper (*id*. at p. 22; *Long Beach Community College District* (2009) PERB Order No. Ad-379, p. 2).

ORDER

Based on the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that The Accelerated Schools (TAS) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b) and (c), by: (1) unlawfully interfering with protected rights when TAS Chief Executive Officer Johnathan Williams threatened bargaining unit member and Service Employees International Union, Local 99 (SEIU) chief steward Hilda Rodriguez-Guzman and SEIU organizer Jorge Roman for leafletting, and separately interfered with protected activity when Williams monitored and surveilled Roman while he attempted to meet with employees; (2) failing to afford SEIU adequate notice and an opportunity to meet and negotiate regarding reasonably foreseeable effects on terms and conditions of employment before eliminating the Health Services Coordinator position, laying off the incumbent, and creating an unrepresented Registered Nurse (RN) position encompassing both the Coordinator role and higher-level health care duties. This conduct also interfered with protected employee and union rights. All other allegations are hereby DISMISSED.

Pursuant to Government Code section 3541.3, it is hereby ORDERED that TAS, its officials, and its other representatives shall:

A. CEASE AND DESIST FROM:

1. Implementing decisions without first affording SEIU adequate advance notice and an opportunity to meet and negotiate over reasonably foreseeable effects on terms and conditions of employment.

2. Threatening employees for engaging in protected activity, monitoring

or surveilling such activity, or otherwise interfering with employee rights that EERA protects.

3. Denying SEIU its rights guaranteed by EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE PURPOSES OF EERA:

1. Upon SEIU's request, meet and negotiate over the effects on terms and conditions of employment of eliminating the Health Services Coordinator position, laying off the incumbent, and creating an unrepresented RN position encompassing both the Coordinator role and higher-level health care duties.

2. Make Rodriguez-Guzman whole for all losses incurred, plus interest at a rate of seven percent per year, from the date of her layoff until the earliest of: (1) the date the parties reach an agreement on the effects of eliminating the Health Services Coordinator position, laying off the incumbent, and creating an unrepresented RN position encompassing both the Coordinator role and higher-level health care duties; (2) the date the parties reach a good faith impasse and exhaust in good faith the negotiating and impasse procedures prescribed by EERA; or (3) the date SEIU fails to request negotiations or fails to bargain in good faith.

3. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to SEIU-represented employees at TAS are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of TAS must sign the Notice, indicating that TAS will fulfill the terms of this Order. TAS shall maintain the posting for a period of 30 consecutive workdays and distribute it by electronic message, intranet, internet site, and other electronic means TAS uses to communicate with SEIU-represented employees. TAS

shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[19]

4. Provide PERB's General Counsel, or the General Counsel's designee, with written notification of all actions taken to comply with this Order, as well as any such further reports as the General Counsel or designee may direct; and concurrently serve SEIU with all such notifications and reports.

Chair Banks and Member Paulson joined in this Decision.

[19] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to employees with whom it does not communicate through electronic means.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case Nos. LA-CE-6431-E, LA-CE-6473-E, LA-CE-6505-E, and LA-CE-6515-E, *Service Employees International Union, Local 99 v. The Accelerated Schools*, in which all parties had the right to participate, the Public Employment Relations Board found that the The Accelerated Schools (TAS) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c), by: (1) unlawfully interfering with protected rights when TAS Chief Executive Officer Johnathan Williams threatened bargaining unit member and Service Employees International Union, Local 99 (SEIU) chief steward Hilda Rodriguez-Guzman and SEIU organizer Jorge Roman for leafletting, and separately interfered with protected activity when Williams monitored and surveilled Roman while he attempted to meet with employees; (2) failing to afford SEIU adequate notice and an opportunity to meet and negotiate regarding reasonably foreseeable effects on terms and conditions of employment before eliminating the Health Services Coordinator position, laying off the incumbent, and creating an unrepresented Registered Nurse (RN) position encompassing both the Coordinator role and higher-level health care duties. This conduct also interfered with protected employee and union rights.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Implementing decisions without first affording SEIU adequate advance notice and an opportunity to meet and negotiate over reasonably foreseeable effects on terms and conditions of employment.

2. Threatening employees for engaging in protected activity, monitoring or surveilling such activity, or otherwise interfering with employee rights that EERA protects.

3. Denying SEIU its rights guaranteed by EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF EERA:

1. Upon SEIU's request, meet and negotiate over the effects on terms and conditions of eliminating the Health Services Coordinator position, laying off the

incumbent, and creating an unrepresented RN position encompassing both the Coordinator role and higher-level health care duties.

2. Make Rodriguez-Guzman whole for all losses incurred, plus interest at a rate of seven percent per year, from the date of her layoff until the earliest of: (1) the date the parties reach an agreement on the effects of eliminating the Health Services Coordinator position, laying off the incumbent, and creating an unrepresented RN position encompassing both the Coordinator role and higher-level health care duties; (2) the date the parties reach a good faith impasse and exhaust in good faith the negotiating and impasse procedures prescribed by EERA; or (3) the date SEIU fails to request negotiations or fails to bargain in good faith.

Dated: _____ THE ACCELERATED SCHOOLS

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.